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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 472.

E. A. HILL, *Petitioner*,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Statement of Facts	1
Argument	2
There is no substantial evidence in the record of negligence by respondent proximately causing petitioner's injury, so that judgment of non-suit was properly rendered	3
A. Petitioner's contention is that L. T. Starling, foreman in charge of men unloading the ties, did not see and warn petitioner of the danger	4
B. Petitioner's contention is that the place where petioner was walking when injured was further from the cars than where the ties being unloaded usually fell	4, 7

TABLE OF CASES.

Brady v. Southern Ry. Co., 320 U. S. 476	12
Eckenrode v. Pennsylvania Railroad Co., 93 L. ed. 64	11
Griswold v. Gardner, 155 F. (2d) 333	3
Gunning v. Cooley, 281 U. S. 90	9
Norfolk & Portsmouth Belt Line v. Jones, 183 Va. 536, 32 S. E. (2d) 720	6, 7
Wolfe v. Henwood, Trustee, St. L. S. W. R. Co., 162 F. (2d) 998	10

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RESPONDENT'S STATEMENT OF FACTS.

The statement of facts in petitioner's petition and brief lacks so much of painting the true picture presented by the testimony in the trial of this case that respondent deems it necessary to also set out the facts:

The defendant was required to introduce no evidence so that all of the facts appearing in the record came from plaintiff's own witnesses.

At the time in question the plaintiff was a member of a train crew which was moving a train, made up of eleven gondola cars, slowly along the track while a crew of laborers was unloading cross-ties from these cars by lifting them and tossing them over the sides of the cars (R. pp. 17-18).

"After the (cross) ties have been thrown out another crew comes along and rearranges them. This is the method of unloading the ties from the gondola cars to the ground, stretched out along beside the track so that when the next crew comes to put the ties in place they are strewn out along the track" (R. p. 18).

"On this particular occasion those men were doing what they were supposed to be doing" (R. pp. 19, 28).

The plaintiff "had been doing this particular type of work for about a year and a half" (R. p. 17).

The plaintiff "had elected to perform his duties from the front end of the train where the locomotive was attached." (Paragraph 4 of Complaint, R. p. 2.) So that when the time came for him to put up signal markers on the other end of the train he had to walk from the engine to the caboose.

He could have done this in complete safety by stepping out into the highway paralleling the track as his conductor did (R. p. 22). But, instead, he walked down beside the track and under the falling cross-ties. And he did this, notwithstanding, "I didn't call any warning to those men throwing ties out that I was coming down beside the train" (R. p. 20).

ARGUMENT.

Summary of Argument.

The sole question before this court on this petition for certiorari is whether there is any substantial evidence in the record of negligence by respondent or its employees which contributed to petitioner's injury. As we will later point out, there is no question whatever of assumption of risk involved, either under the pleadings, evidence, or the State Supreme Court's opinion. We will not, therefore, here discuss the sub-division No. 1 of Petitioner's argument relating to assumption of risk.

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I.

There is no substantial evidence in the record of negligence by respondent proximately causing Petitioner's injury, so that judgment of non-suit was properly rendered.

Preliminary to discussing the facts on the question of negligence, respondent wishes to comment on the statements on Page 17 of petitioner's brief to the effect that the State Supreme Court devoted the greater part of its opinion "all but nine lines" to the question that the Federal Employers' Liability Act does not make the employer an insurer of the safety of employees. Respondent wishes to point out the reason the State Supreme Court devoted so much of its opinion to this question. It was because appellant's brief in the State Supreme Court was almost wholly based on the case of *Griswold* v. *Gardner*, 155 F. 2d 333, and after stating on Page 11 of appellant's brief that "the plaintiff contends it is (the Griswold case) the pertinent law applicable to the facts in this case" their brief then proceeded to quote the opinion in the Griswold case at some length. This is, therefore, obviously the reason why the North Carolina Supreme Court devoted some of its discussion to the Griswold case and the proposition contended for by petitioner. However, the other points raised here were raised before the Supreme Court of North Carolina, and the Supreme Court of North Carolina considered the evidence appearing in the record and held that it was insufficient to show any negligence upon the part of the respondent or its employees and "fails to make out a case of actionable negligence".

It is refreshing to note that the petitioner *now* agrees with the opinion of the North Carolina Supreme Court that the F. E. L. A. does not make the employer the insurer of the safety of employees, and that the basis of liability is employer's negligence.

Petitioner's petition and brief, as we understand them, appear to assign two possible grounds of negligence by

respondent under the evidence, which it is contended the State Supreme Court did not consider:

A.

Petitioner's contention is that L. T. Starling, Foreman in charge of the men unloading the ties, did not see and warn petitioner of the danger; and

B.

Petitioner's contention is that the place where petitioner was walking when injured was further from the cars than where the ties being unloaded usually fell.

In considering petitioner's contention A, above set out, it is necessary to quote at length from the evidence of Mr. Starling. He says (R. pp. 24, 25 and 26):

> "At the time Mr. Hill was injured I was on my last car and I disremember whether ten or eleven cars in the train . . . I had nine men in that gondola car unloading at the time. At the particular time I was standing on the end of the cab . . . I was standing holding the board rod *watching the men in the car.* The first information I had that Mr. Hill had been injured Mr. Sanders, the conductor, hollered, 'Hold the Ties' . . . I hollered and they checked the tie and dropped it on the floor . . . The men picking up these ties out of the gondola cars and throwing them over the side and me there supervising, so intent on what we were doing you couldn't see over the side of the car unless they stop and walk to the edge of the car and look down that way. *Mr. Hill gave no warning at all that he was going to walk under there. Just walked under and a tie went over and hit him.* * * * It is nothing at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab. They go out several distances from the car. At this particular place there was a street right there. I saw Mr. Sanders (the conductor) walking in the street.
>
> Q. Those men in the cab going to the engine or in the engine going to the cab, no one says, 'Look out,

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don't walk under those crossties,' those railroad men are there for that particular purpose?
A. Yes, sir."

From the foregoing, it will be seen that Mr. Starling, plaintiff's own witness, was not there for the purpose of keeping a lookout for petitioner, but for the purpose of supervising the unloading of the cross-ties by his crew, and that that is what he was doing. He was not there for the purpose of giving a warning to petitioner. Petitioner had been doing this type of work for a year and a half (R. p. 17) and had been on this particular operation the entire day. If any warning was to be given that he was going to walk down beside the train under the falling timbers, he was the one to give it and, in his own words "I didn't call any warning to those men throwing ties out that I was coming down beside the train" (R. p. 20). Furthermore, by taking one short step across a ditch petitioner would have had an absolutely safe place to walk in a paved highway. This is what Conductor Sanders did (R. p. 22), but petitioner says "I didn't step across the ditch into the highway" (R. p. 20). Furthermore, the men unloading the ties could not see petitioner walking down beside the train, but he himself says (R. p. 19) "their job is to unload those ties and most of the time their eyes and mind are on that. Their minds should be on what they are doing but like other things sometimes it is not", and petitioner's own witness, Parrish (R. p. 28) says "we were prevented from seeing because the side of the car was too high."

No matter what is said or what argument is made, the conclusion is inescapable that petitioner, in utter disregard of his own safety and without any warning whatever to respondent that he was going to do so, deliberately walked into the path of falling cross-ties which he knew to be falling, which he had observed falling all day long and which he had seen falling for a year and a half. Furthermore, the conclusion is inescapable that respondent was

not guilty of negligence because the petitioner himself and his own witnesses say that all of the men there, except petitioner, were doing exactly what they were supposed to be doing.

The question of assumption of risk is not raised in this case; the issue is not raised in the pleadings; it is not raised in the evidence; it is not raised by the Supreme Court of North Carolina. The sole question is, was there any substantial evidence of actionable negligence on the part of the respondent. How can that question be answered yes when all of the men were doing exactly what they were supposed to be doing? The trial court held that there was no evidence of negligence, and that holding was affirmed by the Supreme Court of North Carolina.

It will be here appropriate to refer to the case of *Norfolk & Portsmouth Belt Line R. Co.* v. *Jones*, 183 Va. 536, 32 S. E. 2d 720, the citation to which was served on respondent by petitioner after petitioner's brief and petition had been served on respondent. This case is easily distinguishable in its facts and holding from the facts in the Hill case now before this court. The opinion of the Virginia Supreme Court of Appeals shows that plaintiff's intestate, Reynard, was an employee and paymaster of a contractor whose men were working in unloading rails for the defendant Belt Line at the time of the injury, but the operation was being done under the supervision of the defendant's foreman. The undisputed evidence as set out in the opinion shows that the operation was done by dropping a rail from one side of the car and then moving the train forward one-half a rail length and dropping another rail on the other side. In the course of his work, plaintiff's intestate was walking along the path close to the track and had not been warned by anyone that a rail was going to be thrown over the car and the rail struck him and injured him. The undisputed evidence showed that all of the employees walked along the path and "there was no other way" to walk. The undisputed evidence further showed that defendant's foreman

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had undertaken to keep a lookout and warn any employee who might be passing when a rail was to be thrown out. He was stationed on the car for that particular purpose and the court says, "The defendant recognized the duty which rests upon it. Wilkins, the foreman, *undertook to look*. Manifestly he performed that duty in a highly inefficient way. It was not reasonably effective, and it was not effective at all." (Italics ours.) The court further states, "Moreover, as we have seen, precautionary measures were actually taken. (That is, the foreman was stationed as a lookout.) The lookout did not look. * * * A lookout's duty is to look and to look at a time when looking will be effective." From the testimony of plaintiff's own witness, Starling, in the present case, it is clear that he was not on the car from which the rails were being thrown for the purpose of looking out and giving a warning, as was the foreman in the Belt Line case, but for the purpose of supervising the men who were actually doing the unloading, and as a matter of fact he did not know that petitioner Hill was near the car at the time he was injured. Respondent therefore submits that the Norfolk & Portsmouth Belt Line R. Co. case is not at all in point under the facts of the instant case.

We next consider

B.

Petitioner's contention is that the place where petitioner was walking when injured was further from the cars than where the ties being unloaded usually fell.

Respondent concedes that the above language is taken from the statement of facts appearing in the opinion of the Supreme Court of North Carolina, but, frankly, we are unable to find in the record anything to support that statement. The nearest that we come to it is Record, p. 20, where it appears that this question was asked:

"Q. If the cross-ties had been dropped by the side of the car in the customary and ordinary way of discharging cross-ties, would it have been possible for you to have been hit in the position you were in?"

However, the record does not disclose any answer to this question, and we are constrained to believe that the Supreme Court of North Carolina included the above quoted statement in its recital of facts for the purpose of showing that even if a cross-tie did go an unusual distance that did not constitute an act of negligence on the part of the respondent because that is literally what the Supreme Court of North Carolina held.

Petitioner testified (R. pp. 13, 14), as follows:

"The conductor traveled North on the West side of the track. When I left the engine going to the caboose I traveled the same way, north, on the West side. The conductor or engineer or any other employee of the Coast Line did not direct me not to go on the West side nor warn me not to go on the West side.

"After I left the engine going to the place I was directed to go, like I said, the conductor preceded me to the back of the train. A walk place, line side of the track. I followed him, same direction he did. He got out and went around the cross-ties, went around good distance off the main line track. I followed him, about two car lengths ahead. They were already empty. Pitching out next to the cab approximately two car lengths ahead of where empty. I came in a circle and came out away from the main line to go around where they were throwing them at. They were turning them down close to the main line and I cuts me a circle. I went further west. Went at a safe distance. I was at least 17 or 18 feet from the southbound track on which the train was moving at the time I was injured . . .

"That track was located 10 or 12 feet from the Southbound main line, parallel . . . In going from the engine I followed substantially the same course that had been followed by the conductor. I knew, of course, the train crew was unloading cross-ties. Been along there a dozen or two times that same day, using the same pre-

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caution. The ties had been cresosoted. Made them slick like."

Furthermore, the record shows on page 28, by petitioner's own witness, Parrish, the following:

"Sometimes the ties that were dumped out of these cars would hit on the end, sometimes they hit flat, sometimes at an angle. Sometimes they hit on other ties that had been thrown out and if you dump one over that happened to hit another tie at an angle it would skid and bounce around. It made an area that a fellow would have to look out for."

It becomes obvious, therefore, from petitioner's testimony that there is no well-defined area within which ties usually or customarily come to rest when dumped from a gondola car and petitioner, with his long experience, must have been fully advertent, or should have been fully advertent, to that fact.

But, even if it be conceded that there is some evidence that the tie went further than usual, it must also be conceded that the record does not show the usual distance ties go, but to the contrary, that there is no well defined area within which ties come to rest, and it must also be borne in mind that both lines of evidence come from petitioner's own witness.

As said in *Gunning* v. *Cooley*, 281 U. S., 90, pp. 94-5:

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *Peoples' Sav. Bank* v. *Bates*, 120 U. S. 556, 562, 30 L. ed. 754, 756, 7 Sup. Ct. Rep. 679; *Southern P. Co.* v. *Pool*, 160 U. S. 438, 440, 40 L. ed. 485, 486, 16 Sup. Ct. Rep. 338. 'When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.' *Ewing* v. *Goode* (By Taft, Circuit Judge) (C. C.) 78 Fed. 442, 444. See *Patton* v. *Texas Pac. Ry. Co.*, 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct.

Rep. 275; *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, ante, 562, 50 Sup. Ct. Rep. 198."

It is difficult to comprehend how the petitioner can say in one breath that the cross-tie was thrown out in an unusual manner, and in three other places in the record put in evidence to the effect that the men were doing exactly what they were supposed to be doing.

The case of *Wolfe* v. *Henwood, Trustee, St. L. S. W. R. Co.*, 162 F. (2d) 998, is remarkably pertinent to this case. In that case Wolfe was required to clean out an oil pit and his clothing became saturated with oil and gasoline. He struck a match to burn some waste which he had piled up and the flame ignited his clothing, and he was burned to death. The Circuit Court of Appeals said:

> "But even if the evidence justified a finding of negligence (which it does not), there was a total failure to establish that negligence was 'in whole or in part' the cause of the injury. The plain fact is Wolfe sustained fatal injuries as a direct result of his own affirmative and voluntary act in lighting a match while he was soaked with a mixture of gasoline and fuel oil . . . We hold that the evidence established as a matter of law that Wolfe's negligent act was the sole cause of the accident."

Is there any difference in the principle of law involved between striking a match while saturated with gasoline, and deliberately walking under falling ties which petitioner knew and saw were falling? In the *Wolfe* case the Court also said:

> "The defendant had the duty to use reasonable care to furnish Wolfe a safe place in which to perform his work. *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. ed. 1444; *Thompson* v. *Boles*, 8 Cir., 123 F. (2d), 487. *But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. In order to*

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recover under the Federal Employers' Liability Act, plaintiff had the burden of proving that defendant was negligent, and that such negligence in whole or in part caused Wolfe's injuries.'' Citing numerous authorities. (Italics ours.)

The Court's attention is called particularly to the recent case of *Eckenrode* v. *Pennsylvania Railroad Co.*, decided by this Court November 15, 1948, 93 L. ed., 64, (Advance Sheets), affirming the same case reported in 164 F. (2d) 996, in which case, the Court said:

> "Upon consideration of the record, the Court is of opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her."

Eckenrode, a trainman, was killed while walking beside the engine on a grade. He was seen to be 12 feet from the side of the engine, with the distance between him and the train increasing as he continued to walk down the spur. This places him below the level of the coal train since the spur is on a down-grade from a frog; the main line is upgrade from a frog. This is the last time the engineer saw Eckenrode until after the accident. The front brakeman, who was 22 cars ahead of the engine, saw Eckenrode walking down the spur, and then diagonally up the bank toward the train. He observed Eckenrode, as he walked up the embankment, stoop down and evidently pick up something. Later, he discovered marks which looked to him like finger marks where Eckenrode stopped. Somehow or other, Eckenrode's head was struck between the lap and lead lever and the cylinder head of the engine. . . . He had been a railroad man for more than forty years, and had worked this same run and done this very job for several years preceding the accident.

In this case, the plaintiff contended that it was the duty of Sunderlin, the engineer, to take precautions to keep from injuring Eckenrode. The Court said:

> "Out of this, we cannot see a scintilla of evidence on which negligence can be found. For a man to be charged with negligence in failing to take precautions there must be some danger towards which these precautions should be directed."

The Court held that there was no sufficient evidence, and affirmed the judgment of the District Court, which had set aside the verdict.

This Court upheld the Court of Appeals, and held there was no sufficient evidence to go to the jury.

To the same effect is *Brady* v. *Southern Railway Co.*, (also a case from North Carolina), 320 U. S. 476. There, the Court said:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

We submit, therefore, that certiorari should be denied.

Respectfully submitted,

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Wilmington, N. C.,
January 13, 1949.

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